UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

IN RE OPINIONS & ORDERS ISSUED BY THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER VARIOUS PROVISIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT	Docket No. Misc. 13-08

MOVANTS' REPLY IN SUPPORT OF THEIR MOTION FOR THE RELEASE OF COURT RECORDS

David A. Schulz
Jonathan Manes
Media Freedom and Information Access Clinic
Yale Law School
P.O. Box 208215
New Haven, CT 06520
Phone: (212) 850-6103
Fax: (212) 850-6299
dschulz@lskslaw.com

Alex Abdo
Patrick Toomey
Brett Max Kaufman
Jameel Jaffer
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
aabdo@aclu.org

Arthur B. Spitzer
American Civil Liberties Union of the Nation's Capital
4301 Connecticut Avenue, N.W., Suite 434
Washington, DC 20008
Phone: (202) 457-0800
Fax: (202) 457-0805
artspitzer@aclu-nca.org

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PRELIMINARY STATEMENT

The government's opposition fails to grapple with the key issues raised by this motion. At issue is the public's right to access opinions of an Article III court that interpret the Constitution and the nation's surveillance laws and that affect the privacy rights of millions of Americans. The government has declassified portions of the four opinions that it represents are responsive to this motion for public access, but it wrongly contends that its unilateral declassification review resolves this motion—that the Court, in other words, has no role to play in determining which portions of its opinions are released and whether the government's extensive redactions satisfy the strict First Amendment standard that governs the sealing of judicial opinions. That is emphatically not the case.

While much of this Court's work may not be subject to a constitutional right of access, this motion concerns opinions containing significant legal interpretation of the Constitution and statutory law. For those sorts of opinions, at least, the First Amendment has always required courts to operate openly to allow the public to assure itself that judicial proceedings are fair and just, to improve the quality of proceedings and the performance of participants, and to educate the public. It obligates the courts to determine—independently, even in cases concerning national security—whether any proposed sealing of their opinions is narrowly tailored to serve compelling interests. Adherence to the Constitution's command is especially vital in this case, given the importance of the opinions sought to the ongoing public, judicial, and legislative debates about the legality and wisdom of permitting the government to acquire Americans' sensitive data in bulk.

An independent judicial determination is also important here because many of the redactions proposed by the government are inexplicable. As but one particularly egregious example, the government has redacted the dates of dozens of seemingly innocuous events,

including the dates that it notified this Court of instances in which it "exceeded the scope of authorized collection" under the Court's bulk-collection orders. The availability of statutory review under the Freedom of Information Act to challenge these redactions is no substitute for the constitutional review required by the First Amendment.

To give effect to the constitutional right of access, this Court should require the government to justify its proposed redactions, permit Movants an opportunity to respond, and then make findings on the record about whether the proposed redactions are narrowly tailored to avert a substantial risk of harm to a compelling governmental interest.

ARGUMENT

I. THE FIRST AMENDMENT REQUIRES THIS COURT TO DETERMINE INDEPENDENTLY WHETHER THE GOVERNMENT HAS DEMONSTRATED A COMPELLING REASON TO REDACT ITS OPINIONS.

Movants' initial papers demonstrated that the opinions of this Court addressing the statutory and constitutional authority for the government's bulk collection of data are subject to the public's First Amendment right of access. *See* Mot. of ACLU and MFIA for Release of Ct. Records ("Mot.") at 12–21. The government's opposition does not dispute or deny this controlling fact. Instead, it argues that no relief is required because declassified versions of the requested opinions have been released by the executive branch, and because this Court should defer to the executive's decision to redact classified information from its opinions. This is wrong.

Where the constitutional right of access applies, a court must determine whether the party seeking to deny public access has established a substantial probability of harm to a compelling interest before the constitutional right may be abridged. *See* Mot. at 22–23; *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 9–11 (1986). The government does not even attempt to carry this burden.

A. Rule 62(a) does not relieve this Court of its obligation under the First Amendment to evaluate the government's justification for the proposed redactions.

Rather than address its constitutional burden, the government simply "[p]ut[s] aside" the First Amendment and argues for dismissal on the basis of FISC Rule 62(a). *See* Gov't Opp'n to Mot. for Release of Court Records ("Opp'n") at 5–7. The government asserts that "the Court is empowered only to 'direct the Executive Branch to review the [opinion] and redact it as necessary to ensure that properly classified information is appropriately protected.'" Opp'n at 5. But a court rule cannot displace a constitutional right. *See Boumediene v. Bush*, 553 U.S. 723, 733 (2008) (statutory procedures cannot displace constitutional privileges where those procedures do not represent an "adequate and effective substitute"); *In re New York Times Co.*, 828 F.2d 110, 115 (2d Cir. 1987) ("Obviously, a statute cannot override a constitutional right."). While Rule 62(a) permits the Court to publish opinions *sua sponte* or on motion by a party, it cannot limit the scope of the First Amendment right of access.

Neither the discretion of this Court under Rule 62(a) to request that the executive undertake a declassification review, nor the potential for the public to request copies of the opinions directly from the executive under the Freedom of Information Act ("FOIA"), are adequate substitutes for the constitutional inquiry required under *Press-Enterprise II.* Before access may be denied to a judicial opinion of an Article III court construing the Constitution and the law, that court must determine whether a denial of access is permitted under the strict standards required by the First Amendment. *See* Mot. at 21–24; *Press-Enterprise II*, 478 U.S. at 13–15.

B. To satisfy the First Amendment right of access, the government should be required to justify its proposed redactions in light of the publicly known facts.

Because the public has a First Amendment right to inspect the opinions at issue, the government must demonstrate to this Court that the *Press-Enterprise II* standards have been

satisfied with respect to each item of information it asks this Court to withhold from the public.[1] As Judge Saylor did in addressing an earlier request for access, the Court should require the government to explain the need for each of its proposed redactions. *See In re Orders of this Court Interpreting Section 215 of the PATRIOT Act* (*In re Section 215 Orders*), No. Misc. 13-02, 2013 WL 5460064, at *8 (FISA Ct. Sept. 13, 2013); *In re Section 215 Orders*, No. Misc. 13-02 (FISA Ct. Nov. 20, 2013). As discussed below, *see infra* Part II, the government must do more than simply assert that the information is classified. Rather, it must provide an explanation of the compelling interest that requires continued secrecy of the fact at issue, and a showing that each redaction is both necessary and narrowly tailored to protect that interest. The government's explanation should not be conclusory and should support each of its proposed redactions. *Cf. In re Section 215 Orders*, No. Misc. 13-02 (FISA Ct. Nov. 20, 2013) ("[T]he government shall submit a detailed explanation of its conclusion that the Opinion is classified in full and cannot be made public, even in redacted form.").

The Court should allow Movants an opportunity to respond to the government's explanation and should then independently assess whether the First Amendment access right may be overcome. The First Amendment mandates such a process. *See Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 609 n.25 (1982) ("[R]epresentatives of the press and general public 'must be given an opportunity to be heard on the question of their

[1] Movants have already fully addressed the government's meritless argument that they lack standing to assert this constitutional right of access. *See* Opp'n at 2–4; Mot. at 10–12; *see also* Mem. of Law in Supp. of Mot. by MFIAC for Recons. of this Court's Sep. 13, 2013 Op. on the Issue of Article III Standing, *In re Section 215 Orders*, No. Misc. 13-02 (FISA Ct. Oct. 11, 2013), http://1.usa.gov/1aTGGa4 (arguing that MFIAC satisfies the requirements for constitutional standing to seek access to this Court's opinions interpreting Section 215 of the PATRIOT Act).

exclusion.'" (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring)).

C. Strict application of the First Amendment standard is particularly important here given the extraordinary public interest in disclosure of these opinions.

The overwhelming public interest in understanding this Court's analysis of the legality of bulk collection demands a rigorous application of the First Amendment. Courts have long recognized that "access is particularly appropriate when the subject matter of the litigation is of especial public interest." *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 146 (2d Cir. 1987). This Court's opinions regarding bulk collection involve some of the most contested and important issues in the public arena today. A public debate regarding the legality of bulk collection by the NSA—often marked by confusion and outrage—has continued unabated since June, when Edward Snowden first revealed the practice of bulk collection.

The President, congressional leaders, and the heads of the intelligence agencies have acknowledged that the Snowden leaks triggered an important public debate about national security and surveillance. President Obama welcomed the debate as "healthy for our democracy" and as a sign of the "maturity" of our nation. *See Transcript: What Obama Said on NSA Controversy*, Wall St. J., June 7, 2013, http://on.wsj.com/19CrJgl. National Intelligence Director James Clapper agreed: "As loathe as I am to give any credit for what's happened here . . . I think it's clear that some of the conversations that this has generated, some of the debate . . . actually probably needed to happen." Agence France-Presse, *NSA Chief Clapper Praise Snowden: Data Spying Debate 'Probably Needed to Happen,'* Raw Story, Sep. 12, 2013, http://www.rawstory.com/rs/2013/09/12/nsa-chief-clapper-praises-snowden-data-spying-debate-probably-needed-to-happen/ (second alteration in original). Even Senator Dianne Feinstein, who had once insisted that "through four years of oversight, the [Senate Select Committee on

Intelligence] has not identified a single case in which a government official engaged in a willful effort to circumvent or violate the law," S. Rep. No. 122-172, at 6 (2012), called for greater transparency and oversight of the programs following the Snowden leaks. *See* Dianne Feinstein, Op-Ed., *Make NSA Programs More Transparent*, Wash. Post, July 30, 2013, http://wapo.st/18v002j.

At the center of this debate is the scope of the NSA's authority and the role of this Court in approving programs of bulk collection. While some members of Congress have insisted that "[t]he FISA Court is taking [its] mandate seriously," Tom Risen, *FISA Judge Denies Surveillance Court Offers 'Rubber Stamp,'* U.S. News & World Report, Oct. 16, 2013, http://www.usnews.com/news/articles/2013/10/16/fisa-judge-denies-surveillance-court-offers-rubber-stamp (quoting Sen. Feinstein), other commentators have called for reform of the Court that would make it "as much like other courts as possible," Editorial, *Privacy and the FISA Court*, L.A. Times, July 10, 2013, http://lat.ms/19CrTEi; *see id.* ("These legal issues—the reach of the Patriot Act and application of the 'special needs' doctrine—have enormous implications for the privacy of Americans. They would be debated by judges in public and ultimately resolved by the Supreme Court."); Editorial, *NSA Oversight Should Be Tough, Clear, and Fair*, Wash. Post, Nov. 2, 2013, wapo.st/JrUGRI. And in recent months, current and former members of the Court have taken the unorthodox step of defending their institution to the public. *See* Letter from Hon. Reggie B. Walton, Presiding Judge, FISC, to Sen. Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary (Oct. 11, 2013), http://1.usa.gov/19Csvd0 (detailing FISC procedures

and practices); Frederic Frommer, *Federal Judge: FISA Court Not a Rubber Stamp*, Huffington Post, July 11, 2013, http://bigstory.ap.org/article/federal-judge-fisa-court-not-rubber-stamp.[2]

Finally, the District Court for the District of Columbia's December 16 ruling that the NSA's bulk collection and querying of phone record metadata is most likely unconstitutional highlights the significant and positive role that judicial transparency can play in enhancing this public debate. *See Klayman v. Obama*, No. 13-cv-0851, 2013 WL 6571596 (D.D.C. Dec. 16, 2013). The overwhelming public response to the opinion,[3] both positive[4] and negative,[5] illustrates the productive dialogue that judicial decisions can and should generate—precisely the dialogue hindered by the government's redaction of the opinions requested here. Indeed, even a leading academic defender of the NSA's surveillance activities argued that Judge Leon's opinion, though "unpersuasive in its reasoning," nevertheless "starts a conversation that might lead to some very interesting places."[6] Just days ago, the President's own review group joined

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[2] Other former members of the FISC, meanwhile, have publicly criticized elements of the Court's procedures. *See, e.g.*, Hon. James G. Carr, Op-Ed., *A Better Secret Court*, N.Y. Times, July 22, 2013, http://nyti.ms/19CsG8l; Stephen Braun, *Former Judge Admits Flaws with Secret FISA Court*, Associated Press, July 9, 2013, http://bigstory.ap.org/article/oversight-board-hears-testimony-nsa-spying (quoting Hon. James Robertson).

[3] For general coverage of Judge Leon's opinion, see Ellen Nakashima & Ann E. Marimow, *Judge: NSA's Collecting of Phone Records Is Probably Unconstitutional*, Wash. Post, Dec. 16, 2013, http://wapo.st/19CsNAD; and Charlie Savage, *Judge Questions Legality of N.S.A. Phone Records*, N.Y. Times, Dec. 16, 2013, http://nyti.ms/19CsRAB.

[4] *See, e.g.*, Editorial, *NSA's Phone Record Sweep-Up Harder To Defend: Our View*, USA Today, Dec. 17, 2013, http://usat.ly/19CsVQT.

[5] *See, e.g.*, Robert F. Turner, Op-Ed., *Why Judge Leon's NSA Ruling Is Wrong*, Wall St. J., Dec. 17, 2013, http://on.wsj.com/19CsXZ0.

[6] Orin Kerr, *Preliminary Thoughts On Judge Leon's Opinions*, Volokh Conspiracy (Dec. 16, 2013, 6:54 PM), http://www.volokh.com/2013/12/16/preliminary-thoughts-judge-leons-opinion/.

that conversation with a three-hundred-page report that recommends, in part, greater transparency in this Court's operation.[7]

Whatever one thinks of the various viewpoints on this issue, the extraordinary—and inadequately informed—public debate surrounding this Court's activities requires a careful and rigorous application of the First Amendment standards governing public access to the Court's decisions.

II. AN EXECUTIVE BRANCH DECLASSIFICATION REVIEW DOES NOT SATISFY THE REQUIREMENTS IMPOSED BY THE FIRST AMENDMENT FOR KEEPING JUDICIAL OPINIONS SECRET.

The government urges the Court to accept its declassification review and respectfully step aside. This declassification review, however, fails to satisfy the government's constitutional burden to justify censoring portions of a judicial opinion. Moreover, the fruits of its declassification review in this case—four opinions redacted to shreds—amply illustrate the need for independent judicial review of the proposed redactions in light of the overwhelming public interest in understanding the Court's analysis and application of the nation's surveillance laws.

A. The government ignores the essential role of the judiciary in independently assessing the public's right of access to judicial opinions.

The government's misguided approach focuses on the wrong issue. It stresses that "the First Amendment does not justify judicial . . . involvement in Executive Branch classification decisions." Opp'n at 4. But the issue is not what the executive branch can classify, but whether the executive branch can *unilaterally* restrict public access to a judicial decision. "While it is true, as an abstract proposition, that the government's interest in protecting classified information can be a qualifying compelling and overriding interest," the First Amendment "require[s] a

[7] President's Review Group on Intelligence and Communications Technologies, *Liberty and Security in a Changing World* 200–07 (Dec. 12, 2013), http://1.usa.gov/19Cu8aL.

judicial inquiry into the legitimacy of the asserted national security interest, and specific findings, sealed if necessary, about the harm to national security that would ensue if the request" is not granted. *United States v. Rosen*, 487 F. Supp. 2d 703, 717 (E.D. Va. 2007) (emphasis added). Indeed, "[a] blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse." *In re Washington Post Co.*, 807 F.2d 383, 391–92 (4th Cir. 1986).

Accordingly, where First Amendment rights apply, courts routinely subject claims that information must remain secret to the heightened level of scrutiny the Constitution demands. *See* Mot. at 25–27; *see also, e.g.*, *McGehee v. Casey*, 718 F.2d 1137, 1148–49 (D.C. Cir. 1983) (explaining, in the context of First Amendment challenge to censorship of article written by former government employee, that since "the judiciary's tasks include the protection of individual rights[,] . . . courts must assure themselves that the reasons for classification" are acceptable); *Doe v. Gonzales*, 386 F. Supp. 2d 66, 76 (D. Conn. 2005) ("While the court recognizes the [government's] expertise in the area of counter-terrorism and is inclined to afford their judgments in that area deference, those judgments remain subject to judicial review."); *United States v. Grunden*, 2 M.J. 116, 122 (C.M.A. 1977) (explaining that the trial judge "must be satisfied from all the evidence and circumstances" that classification warrants the closure of proceedings).

Courts must independently evaluate whether the executive's proposed sealing overcomes the public's right of access because the First Amendment requires it, but also because the standard for classification differs significantly from the First Amendment standard for sealing judicial opinions. Under Executive Order 13,526, information may be classified if an executive

official determines that "unauthorized disclosure . . . reasonably could be expected to result in damage to the national security." Exec. Order. 13,526 at § 1.1(4). But the First Amendment permits sealing only after a judicial determination that the sealing is narrowly tailored to avoid a "substantial probability" of harm. *Press-Enterprise II*, 478 U.S. at 14. Thus, in evaluating the withholding of records under these two different standards, courts might uphold classification even while finding the justifications for secrecy wanting under the First Amendment. *Compare, e.g., ACLU v. Dep't of State*, 878 F. Supp. 2d 215, 223–24 (D.D.C. 2012) (concluding that documents publicly disclosed by Wikileaks but not "officially acknowledged" remain properly classified), *with Bank Julius Baer & Co. v. Wikileaks*, 535 F. Supp. 2d 980, 985 (N.D. Cal. 2008) (The First Amendment bars preliminary injunction against Wikileaks to prevent further dissemination of confidential bank records once "the cat is out of the bag.").

B. Many of the government's proposed redactions are facially suspect and warrant careful judicial review.

Here, the heavy redactions to the Court's opinions proposed by the government only underscore the need for independent judicial assessment of the sealing. While "release of redacted material is clearly a less restrictive means" of protecting a party's interest than blanket sealing, *Globe Newspaper Co. v. Pokaski*, 684 F. Supp. 1132, 1136 n.4 (D. Mass. 1988), *aff'd in part, rev'd in part*, 868 F.2d 497 (1st Cir. 1989), the judiciary must "independently examine the Government's redactions . . . to ensure that the redactions . . . are no greater than necessary," *United States v. Moussaoui*, 65 F. App'x 881, 888 (4th Cir. 2003).

Despite the obligation to minimize redactions to those essential to protect a compelling interest, the government proposes extensive, and often questionable, redactions that seriously impair the public's ability to understand and evaluate the Court's reasoning and holdings. By way of example, the government seeks to shield from public view such items as:

- The definition of the "metadata" for which bulk collection is authorized;[8]
- The duration of the bulk collection authorized;[9]
- The manner in which internet metadata was used, beyond contact chaining;[10]
- The nature and duration of the government's non-compliance with past orders;[11] and
- Dozens of seemingly innocuous dates, such as the dates of FISC opinions and applications to the Court, and even the dates the government notified this Court of its violations of court-imposed limitations on its bulk collection programs.[12]

These redactions appear unjustified on their face and warrant the Court's attention.

Of these, perhaps the most troubling is the government's attempt to keep secret the categories of metadata it was authorized to collect—the very subject, in other words, of its applications. *See, e.g.*, Kollar-Kotelly Opinion at 7–11; Bates Opinion at 2. Without this information, the opinions merely recite the Fourth Amendment's third-party doctrine, but they omit the information necessary to make sense of the Court's application of this doctrine to the

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[8] *See* Opinion and Order Authorizing Collection of Bulk Electronic Communications Metadata at 7–11, 19 (Kollar-Kotelly, J.) (released Nov. 18, 2013), http://1.usa.gov/19Ct5rl ("Kollar-Kotelly Opinion") ("[Redacted] like other forms of metadata, is not protected by the Fourth Amendment . . . ."); Opinion and Order Authorizing Reinstatement of Bulk Collection of Internet Metadata at 2, 35, 71 (Bates, J.) (released Nov. 18, 2013), http://1.usa.gov/19Ct7Q5 ("Bates Opinion") ("The government requests authority to [redacted] categories of [sixteen pages of redacted material].").

[9] *See, e.g.*, Bates Opinion at 4.

[10] *See, e.g.*, Kollar-Kotelly Opinion at 42–43 ("NSA proposes to employ two analytic methods on the body of archived meta data it seeks to collect. . . . The two methods are: (1) *Contact chaining* . . . [(2)] [Redacted].").

[11] *See, e.g.*, Bates Opinion at 2–3 ("[T]he government acknowledges that NSA exceeded the scope of authorized acquisition continuously during the more than [redacted] years of acquisition under these orders."); *id.* at 105 ("[T]he unauthorized collection included: [redacted].").

[12] *See, e.g.*, Kollar-Kotelly Opinion at 2, 3, 70; Bates Opinion at 4, 10, 13, 14; Amended Memorandum Opinion Reauthorizing Bulk Collection of Telephony Metadata at 20 (Eagan, J.) (published Sept. 17, 2013), http://1.usa.gov/19CteLk ("Eagan Opinion"). As but one of many examples, Judge Bates's discussion of the government's violations reads as follows: "On [redacted] the government provided written notice to the FISC that it had exceeded the scope of authorized collection [redacted]." Bates Opinion at 10.

government's requests. *See* Ellen Nakashima & Greg Miller, *Official Releasing What Appears To Be Original Court File Authorizing NSA To Conduct Sweeps*, Wash. Post, Nov. 18, 2013, http://www.wapo.st/IGqxNK (because "[t]hree pages [of the Kollar-Kotelly Opinion] describing the 'metadata' . . . were redacted," its "true scope" remains "unclear"). Judge Bates describes this application of doctrine to categories of metadata as "difficult line-drawing," Bates Opinion at 71—precisely the type of "line-drawing" that the public must see to understand how the law is being construed and how the Constitution is being applied in this contested area. *See Mosaid Technologies Inc. v. LSI Corp.*, 878 F. Supp. 2d 503, 513 (D. Del. 2012) (rejecting proposal to redact discussion of how precedent "should (or should not) apply to the present facts").

Beyond the nature of the material the government seeks to redact, the sheer volume of its redactions in some cases "would have the practical effect of sealing the entire case" and leave an interested citizen with "no idea what to make" of the redacted opinions. *In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d 602, 604 (S.D.N.Y. 2011); *see CRAssociates, Inc. v. United States*, 102 Fed. Cl. 698 (Fed. Cl. 2011), *aff'd*, 475 F. App'x 341 (Fed. Cir. 2012) (rejecting proposed redactions since "the public version of th[e] document would scarcely be comprehensible"). For example, with approximately twenty-five pages redacted, Judge Kollar-Kotelly's opinion is full of impenetrable—but likely critical—passages that are void of the meaning they ought to have. Likewise, in redacting Judge Bates's opinion, the government seeks to shield dozens of consecutive pages wholesale, *see* Bates Opinion at 35–52, 57–70, while also excising the individual words or phrases that give meaning to his discussion, *see* Bates Opinion at 3, 5. Such extensive redactions "obscure any discussion of the actual nature" of the opinions and defeat the core oversight purpose of the access right. *In re Mosaid Technologies Inc.*, 878 F.

Supp. 2d at 507–08 (rejecting the parties' proposal to redact 40 percent of one transcript and 60 percent of another).

Whether these redactions could be justified—and it is difficult to see how all of them could be—their nature and scope call for independent evaluation. Contrary to the government's position, a court cannot "delegate its authority" to edit and redact a judicial document and must instead "make its own redactions, supported by specific findings, after a careful review of all claims for and against access." *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995); *see also United States v. Moussaoui*, 65 F. App'x 881, 888 (4th Cir. 2003) ("The interest of the public in the flow of information is protected by our exercising *independent* judgment concerning redactions." (emphasis added)).

Given the extent of the government's proposed redactions and the tremendous public interest in the contents of these opinions, this Court's "independent judgment" is essential.

III. FOIA IS NO SUBSTITUTE FOR THE CONSTITUTIONAL RIGHT OF ACCESS.

In light of the judiciary's constitutional mandate to independently police access to its own proceedings and records, the government's reliance on FOIA—a *statute* governing access to *executive* materials—is wholly misplaced. The government's error not only demonstrates a disturbing insensitivity to core separation-of-powers principles, but it would also have the practical effect of narrowing or eliminating the public's First Amendment right of access.

A. FOIA's statutory standards for withholding differ significantly from the First Amendment's standard for sealing judicial opinions.

FOIA's statutory standards for determining when information may be withheld from the public cannot satisfy the constitutional right of access that applies to the opinions of this Court. The government is thus wrong in asserting that "'there would be no point in this Court's merely duplicating the judicial review that the ACLU, and anyone else, can obtain by submitting a FOIA

request to the Department of Justice for these same records.'" Opp'n at 3–4 (quoting *In re Release*, 526 F. Supp. 2d at 496 n.32). The review this Court undertakes in applying First Amendment standards are not "the same standards as a district court would [apply] in the FOIA litigation," *id.* at 4, particularly where classified information is involved. Whereas *Press-Enterprise II* requires courts to exercise their independent judgment as to whether a compelling need requires some secrecy for information in a court opinion, FOIA directs courts to determine only whether the executive has shown that it "appears 'logical' or 'plausible'" that the records sought are properly classified. *Wolf v. CIA*, 473 F.3d 370, 374–75 (D.C. Cir. 2007). In both cases appropriate deference is given to the "expertise of agencies engaged in national security and foreign policy," *id.* at 374, but the ultimate issue for the court to decide is very different where the constitutional right of access attaches.[13]

This difference may well be dispositive here: the government's proposed redactions to the four opinions at issue might satisfy FOIA's inquiry into whether the information is properly classified, but still fail to pass *Press-Enterprise II*'s exacting standard requiring a "substantial probability" of harm and "narrow[] tailoring." *Compare ACLU v. Dep't of State*, 878 F. Supp. 2d at 223–24, *with Bank Julius Baer*, 535 F. Supp. 2d at 985. The government thus fails to appreciate that these distinct standards of review—and the necessary possibility of divergent outcomes—prevent a court from supplanting the First Amendment right of access with FOIA.

[13] *Cf. Wright v. FBI*, 613 F. Supp. 2d. 13, 24–25 (D.D.C. 2009) ("Plaintiffs have relied upon the First Amendment, not FOIA, and the Government has cited to no case holding that FOIA is coterminous with the First Amendment. . . . Consequently, censorship is prohibited, even if the material falls within a FOIA Exemption, where the Government fails to show with reasonable specificity that its interest in censorship . . . outweighs the interest of prospective speakers in free dissemination of those speakers' views.").

B. The government's proposal to substitute FOIA review for First Amendment analysis would eviscerate the constitutional right of access.

The government's demand that Movants "respect, and not through [their] motion attempt to circumvent, the FOIA process enacted by Congress," Opp'n at 4, if accepted by this Court, would upend the public's qualified constitutional right to inspect court records and attend court proceedings. Under this theory, the government could defeat public access by "classifying" court records or evidence to be submitted in court—even the Supreme Court—and demanding that members of the public rely solely on FOIA to seek access.[14] Access as a constitutional right protected by the judicial branch would become, by this sleight of hand, a solely statutory matter.

Alternatively, the government could entirely defeat the public's right of access to this Court's opinions—wholly insulating them from public review—by refusing to take the opinions into its possession or to maintain copies over time. Since there is no affirmative requirement that the government do so, and since FOIA does not permit a requester to seek records directly from a court, *Mayo v. U.S. Gov't Printing Office*, 9 F.3d 1450, 1451 (9th Cir. 1993), public access to this Court's opinions would rise or fall on the vagaries of the Justice Department's document-retention policy. FOIA is thus no substitute for review required under the First Amendment and provides no proper basis to dismiss this motion.

[14] In enacting the Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1–16 ("CIPA") Congress recognized that the need to use "classified" information in a criminal prosecution does not automatically justify an abridgment of the public's right of access. Where classified information is deemed by a judge to be relevant and admissible in a criminal prosecution, CIPA requires the government either to declassify it, find an acceptable non-classified alternative, or face consequences up to and including dismissal of the indictment; it does not authorize the prosecution to proceed in a closed courtroom or on a sealed record. *See generally* Edward C. Liu & Todd Garvey, Cong. Research Serv., R41742, Protecting Classified Information and the Rights of Criminal Defendants: The Classified Information Procedures Act 6–11 (2012).

CONCLUSION

For the foregoing reasons, Movants respectfully request that this Court deny the government's request to dismiss their motion and instead unseal its opinions addressing the constitutional and statutory bases for the "bulk collection" of records under various authorities within FISA, including but not limited to 50 U.S.C. § 1842. Movants request that these materials be released as quickly as possible and with only those redactions essential to protect information that the Court determines, after independent review, to warrant continued sealing. Given the relevance of the opinions to an ongoing debate of immense public interest, Movants also request expedited consideration of this motion, as well as oral argument before the Court.

Respectfully submitted,

Dated: December 20, 2013

/s/ David A. Shulz

David A. Schulz
Jonathan Manes
Media Freedom and Information Access Clinic
Yale Law School[15]
P.O. Box 208215
New Haven, CT 06520
Phone: (212) 850-6103
Fax: (212) 850-6299
dschulz@lskslaw.com

Alex Abdo
Brett Max Kaufman
Patrick Toomey
Jameel Jaffer
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654

[15] This memorandum has been prepared with the assistance of Yale Law School students, Patrick Hayden '14, John Langford '14, Anjali Motgi '14, Max Mishkin '14, and Brianna van Kan '15. This brief does not purport to present the institutional views of Yale Law School, if any.

aabdo@aclu.org

Arthur B. Spitzer
American Civil Liberties Union of the
Nation's Capital
4301 Connecticut Avenue, N.W., Suite 434
Washington, DC 20008
Phone: (202) 457-0800
Fax: (202) 457-0805
artspitzer@aclu-nca.org

CERTIFICATE OF SERVICE

I, Alex Abdo, certify that on this day, December 20, 2013, a copy of the foregoing brief was served by UPS on the following persons:

Eric H. Holder
Attorney General
Office of the Attorney General
U.S. Department of Justice
National Security Division
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

John P. Carlin
Acting Assistant Attorney General for National Security
U.S. Department of Justice
National Security Division
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Christine Gunning
Litigation Security Group
U.S. Department of Justice
2 Constitution Square
145 N Street, N.E.
Suite 2W-115
Washington, DC 20530

/s/ Alex Abdo
Alex Abdo